VII. THE PROBLEM — RSA 674:41 — Prohibition on Building

In the 1997 NHMA handbook on road law entitled *"A Hard Road to Travel"* (hereinafter "NHMA Road Law"), Attorney Bernie Waugh refers to this statute as "zoning at the state level." NHMA Road Law at 114. In order to break down this complicated statute, we need to examine it in its parts:

> From and after the time when a planning board shall expressly have been granted the authority to approve or disapprove plats... no building shall be erected on any lot within any part of the municipality, nor shall a building permit be issued for the erection of a building unless the street giving access to the lot upon which such building is proposed to be placed:

RSA 674:41,1. Stop here and examine the applicability of this statute. First, we know that it applies automatically in any municipality unless the municipality does not have a planning board with subdivision approval authority. See *Vachon v. Town of New Durham, ZBA,* 131 N.H. 623, 629 (1989). Second, we know that it applies even if the municipality does not require building permits. The statute prohibits erection of "building[s]" and/or the issuance of building permits. In any communities that have installed a planning board, but do not yet require building permits, this prohibition will apply.

One item that is not entirely clear is exactly what construction is prohibited. This is a gray area. When one examines the statute in the context of what it is attempting to accomplish, *Appeal of Mascorna Valley Regional School District,* 141 N.H. 98(1996) (Goal in interpreting statutes is to apply statutes in light of legislative intent in enacting them, in light of the policy sought to be advanced by the entire statutory scheme), it is not intended to prohibit the erection of a doghouse, a tool shed, or perhaps even an attached garage. The focus seems to be on public safety and residential use. Clearly, construction of a new dwelling unit would fall within the ambit of this statute. Under this rationale, an addition to an existing structure to create an additional living unit would likely be regulated as well. It has been suggested by Attorney Waugh that a study of the law of expansion of nonconforming uses would be helpful in analyzing this section. NFIMA Road Law at 118. *New London v. Leskiewicz,* 110 N.H. 462(1970) establishes a three part test in evaluating changes to nonconforming uses: (1) To what extent does the proposed use reflect the nature and purpose of the prevailing nonconforming use, (2)Is the proposed use merely a different manner of utilizing the same use, or does it constitute a use different in character, nature and kind, and (3) Does this new use have a substantially different effect on the neighborhood?

Finally, RSA 674:41, I, refers to the "street giving access to the lot.' Many municipal law practitioners thought this language simply created a requirement for frontage. Until the New Hampshire Supreme Court decided the case of *Belluscio v. Town of Westmoreland,* 139 N.H. 55 (1994), the meaning of this phrase was somewhat ambiguous. In that case, the Supreme Court allowed a permit on a lot served by an easement off an acceptable road. The only reason to remember the *Belluscio* case is to recognize that it prompted the legislature to amend the law in

1995. See Chapter 291, Laws of *1995.* That section specifies that:

> For the purposes of paragraph I, "the street giving access to the lot" means a street or way abutting the lot and on which the lot has frontage. It does not include a street from which the sole access to the lot is via a private easement or right of way, unless such easement or right of way also meets the criteria set forth [above].

RSA 674:41 (ill). Pursuant to this clarification, a lot with no frontage but only served by a right-of-way (such as the lot in *Belluscio)* will not meet the statutory criteria. Despite this clarification, it seems that the language still presents one more unresolved conflict. What if there is a situation where there clearly is "frontage" but no access, i.e., a limited access state/federal highway? It would appear that the second sentence of paragraph IH would disqualify limited access highway frontage, but there is certainly room to argue that the two sentences are inconsistent in these circumstances.

> [A note for local officials. This "limited access" question has come up in the community that Attorney Campbell represents. You should not only rely on RSA 674:41 to protect you, but you should examine your definition of "frontage' in your own zoning ordinances to address this issue.]

Now that we have parceled out the limitations, what are the requirements for the road itself? The statute provides that to qualify to construct a building (without special permission discussed in section VIII below) the road:

> (a) Shall have been accepted or opened as, or shall otherwise received the legal status of, a Class V or better highway prior to that time; or
> (b) [Correspond] in its locations or lines with
> (1) A street shown on the official map; or
> (2) A street on a subdivision plat approved by the planning board
> (3) A street plat made and adopted by the planning board; or
> (4) A street located and accepted by the local legislative body of the municipality after submission to the planning board, and, in case of the planning board's disapproval, by favorable vote required in RSA 674:40;

RSA 674:41(I). Most of these requirements are pretty straightforward. We have reviewed the definition and significance of a Class V road. Class V roads that "otherwise received legal status" are those that have become public highway by prescription as opposed to layout or dedication and acceptance. E.g., *Catalano v. Town of Windham,* 133 N.H. 504 (1990). In some communities, this language has been used to waive or avoid the application of RSA 674:41 where there are "private" roads that the town has been plowing and maintaining even though there has never been a legal acknowledgment that the road is a town road (i.e., a *de facto* town road — not a good practice!)

A street on the "official map," referred to in subparagraph (b)(l), is a rarity. There is a little used section in RSA 674 which allows a planning board to approve an official map intended to reserve

certain highway corridors. See RSA 674:10. This is not to be confused with any other type of map, including DOT maps. There are only one or two communities that have adopted an official map. Because of takings problems, communities have been advised not to use this law. See NHMA Road Law at 135.

The reference to a "street on a subdivision plat approved by the planning board" in subparagraph (b)(2) seems pretty straightforward. However, if there is a plan that the board is considering that shows lots bordering a private road or a Class VI road, the board should be careful not to inadvertently give that road a status was not intended. If the board intends to eliminate a claim that a bordering road is "on a subdivision plat" and, thus, approved for purposes of 674:4 1, then it is advisable to note on the plat that its depiction is "not intended to confer approval status under RSA 674:41 (I)(b)(2)."

RSA 674:41 recognizes roads on "street plat[s]" as sufficient for building without further 674:41 approvals. In this circumstance, it is suggested that a landowner be allowed to submit a plan to the planning board which does not create a "subdivision" but is in fact intended to seek ratification and approval of an existing or proposed "way" as an approved street for the purposes of RSA 674:41. See NHMA Road Law at 117. Remember, however, that the planning board cannot bind the community to accept an approved road as a town road (Class V). *Beck v. Auburn*, 121 N.H. 996 (1981). All the planning board can do through either subdivision approval or street plat approval is make the lot eligible for building under RSA 674:41. Local zoning ordinance requirements must still be met.

A street "located and accepted by the local legislative body" referenced in subparagraph (b)(4) effectively becomes a Class V road, so this section actually operates the same as subparagraph 1(a).

Finally, to reinforce the applicability of this statute, RSA 674:41,111, provides:

> This section shall supersede any less stringent local ordinance, code or regulation, and no existing lot or tract of land shall be exempted from the provisions of this section except in accordance with the procedures expressly set forth [above].

RSA 674:41, III. This is clear; no exceptions, and no grandfathered lots. So does this section "trump" local zoning? The answer is "no." Local ordinances may be more stringent. (Statutory rule of construction: Since the legislature specifically wrote "less stringent," it acknowledged that laws may be more stringent). Thus, the fact that a road meets the statutory criteria under RSA 674:41 does not automatically make it buildable under the zoning ordinance. In fact, you may still (and probably will) require a variance (with all five of the famous criteria) to build on a lot even though you do not need relief under 674:41.